Jackson v. Attorney General of Nevada, No. 05-16436

PAEZ, Circuit Judge, concurring and dissenting:

I concur in Part A of the majority disposition, but I respectfully dissent from Part B. In reviewing *de novo* the constitutionality of Jackson's state detention by applying the two-step *Flores-Ortega* analysis, I agree that under the first step a rational defendant in Jackson's position may not have wished to appeal, given that he had waived most of his appellate rights in the plea agreement. Under the second step, however, the record is transparent that "this particular defendant" *was* interested in appealing, therefore I dissent from the majority's analysis. I would reverse the district court judgment and remand with instructions to grant conditional habeas relief.

Prior to sentencing, Jackson unsuccessfully moved to withdraw his *Alford* plea, professed his innocence, and expressed frustration that his trial counsel had rushed him into pleading guilty without adequately developing his case and without giving him enough time to consider the benefits and drawbacks of not proceeding to trial. Moreover, Jackson's appeal waiver did not foreclose a challenge "based upon reasonable constitutional jurisdictional or other grounds that

challenge the legality of the proceedings."[1] Jackson's assertions that he pleaded guilty because of his trial counsel's ineffective representation and that he was uninformed as to the possibility that his sentence would include lifetime supervision[2] constituted just such a challenge.

The majority relies heavily on language in *Flores-Ortega* that describes a defendant's decision to plead guilty as a "highly relevant factor" to the determination of whether a rational defendant would have wanted to appeal. The fact of pleading guilty is not dispositive however, because the Supreme Court's two-part test imposes a duty to consult so long as the defendant "reasonably demonstrated" his interest—rational or not—in appealing. 528 U.S. at 480. In *Flores-Ortega*, the defendant had pleaded guilty to second-degree murder, *id.* at 473, but rather than holding that he was *per se* barred from proving that his trial counsel had a constitutional duty to consult with him about the option of appealing,

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[1] In *United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005), we relied on *Flores-Ortega* to hold that a defendant could show prejudice from the loss of an opportunity to appeal even when the written plea agreement contained a waiver and when the judge ascertained during the plea colloquy that the defendant understood the ramifications of that waiver. *Id.* at 1194. *See also Flores-Ortega*, 528 U.S. at 473–74 (noting that the trial court verified that Flores-Ortega understood his limited appellate rights and the time frame for filing an appeal).

[2] *See Sandoval-Lopez*, 409 F.3d at 1196 (holding that counsel should be on notice of a duty to consult when the defendant was not sentenced in accord with his plea agreement).

the Court articulated the two-part test and remanded with instructions to apply that test to the facts at hand.

Following *Flores-Ortega*'s clear instructions, I would hold that no professionally reasonable attorney would have failed to realize that, in light of Jackson's motion to withdraw his guilty plea, his continued profession of innocence, his dissatisfaction with his lawyer's work on his case, and his objection to the lifetime supervision provision, Jackson would have wanted to be "advis[ed] . . . about the advantages and disadvantages of taking an appeal." *Id.* at 478. In contrast to the majority's interpretation of *Flores-Ortega*, neither Jackson's guilty plea nor the appeal waiver in his plea agreement absolved Jackson's lawyer of the duty to "mak[e] a reasonable effort to discover [Jackson's] wishes." *Id.* at 478; *see Sandoval-Lopez*, 409 F.3d at 1194.

I would also hold that the failure of Jackson's trial counsel to consult with Jackson about an appeal was prejudicial. To demonstrate prejudice Jackson need not show "that he might have prevailed on appeal . . . just that he probably would have appealed had his lawyer asked." *Id.* at 1196. For the same reasons discussed above, the record here indicates that "but for counsel's deficient performance [in failing to consult, Jackson] would have appealed." *Flores-Ortega*, 528 U.S. at 483 (citing *Strickland*, 466 U.S. at 658–59).

Jackson has therefore demonstrated that he received constitutionally ineffective assistance when his trial counsel failed to consult with him about the possibility of appealing his conviction and sentence. Although a "rational defendant" in Jackson's shoes may not have wanted to appeal, Jackson's actions at the sentencing hearing would have put a professionally reasonable attorney on notice of the duty to consult with him about the benefits and drawbacks of doing so. I would therefore reverse the district court's judgment and remand with instructions to grant a conditional writ of habeas corpus, directing the state court either to release Jackson from state custody or to allow him, within a reasonable time, to perfect a direct appeal.